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8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON**
10 **AT SEATTLE**

11 EVANSTON INSURANCE
12 COMPANY,

13 Plaintiff,

14 v.

15 CLARTRE, INC. and SCOTT CLARKE,

16 Defendants.

17 CASE NO. 2:14-cv-00085-BJR

18 **ORDER GRANTING MOTION**
19 **FOR SUMMARY JUDGMENT**
20 **AS TO DEFENDANTS'**
21 **COUNTERCLAIMS**

22 Before the Court is Plaintiff Evanston Insurance Company's [62] Motion for Summary
23 Judgment on Defendants' Counterclaims. The motion is fully briefed and ripe for resolution. For
24 the reasons set forth below, the Court grants Plaintiff's motion.

25 **I. BACKGROUND**

26 Plaintiff Evanston Insurance Company ("Evanston") is the insurer for Defendants
27 Clartre, Inc. ("Clartre") and Scott Clarke ("Clarke") (collectively, "Defendants"). Defendants
28 were sued in Whatcom County Superior Court ("the underlying litigation") for misappropriation
29 of trade secrets and confidential information and other related claims. *See* Decl. of David R.
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1 Greenberg, Docket No. 71, Ex. A (Amended Compl.) ¶¶ 75-154. Evanston provided legal defense
 2 to Defendants in the underlying litigation under a reservation of rights. Evanston filed the instant
 3 suit on January 21, 2014, seeking a declaration of no coverage, i.e., that it has no duty to defend
 4 Defendants in the underlying actions. On October 7, 2015, Defendants filed counterclaims
 5 alleging violation of Washington's Insurance Fair Conduct Act ("IFCA"), RCW §§ 48.30, *et seq.*,
 6 violation of Washington's Consumer Protection Act ("CPA"), RCW §§ 19.86, *et seq.*, bad faith,
 7 and negligence due to Evanston's alleged failure to fully pay Defendants' attorney's fees related
 8 to the underlying litigation. In the instant motion Evanston seeks summary judgment as to these
 9 counterclaims.¹

10 Upon agreement by Evanston to defend Defendants under a reservation of rights,
 11 Defendants refused Evanston's appointment of counsel and instead requested that their present
 12 attorneys continue representation, with their services to be reimbursed by Evanston. Decl. of Peter
 13 Mintzer, Docket No. 63, Ex. A (Letter from Defendants). Evanston agreed to permit Defendants
 14 to retain their attorneys, subject to Defendants' attorneys complying with Evanston's "Litigation
 15 Management Guidelines – Defense." Decl. of Peter Mintzer, Docket No. 63, Ex. B (Letter from
 16 Plaintiff).

17 At issue in Defendants' counterclaims is the question whether Evanston's refusal to pay
 18 a portion of Defendants' attorney's fees was reasonable. Defendants' attorneys have billed total
 19 costs of \$1,472,487.13. Decl. of James D. Nelson, Docket No. 69 at ¶ 7. According to Defendants,
 20 Evanston has refused to pay some amount "less than \$50,000." *Id.* Defendants contend that this
 21 nonpayment, combined with the fact that Defendants were forced to file appeals to Evanston

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 24 ¹ On January 21, 2016, the Court issued an Order [75] granting Evanston's [30] Motion for Summary Judgment and issuing a declaration of no coverage and no duty to defend as to Defendants.

1 regarding \$318,343.66 of the deductions, is sufficient evidence that Evanston has acted
 2 unreasonably and in bad faith. *Id.* Defendants' claim of negligence is included in their claim of
 3 bad faith, as they contend that Evanston has breached its duty "to exercise reasonable care to avoid
 4 unreasonably controlling or limiting the defense of its insureds and/or unreasonably denying
 5 coverage and/or payment of benefits." Counterclaims, Docket No. 52 at ¶ 7.2. Similarly,
 6 Defendants' counterclaims based on violation of IFCA and the CPA are premised upon the same
 7 nonpayment of attorney's fees by Evanston. Specifically, Defendants argue that Evanston has
 8 violated IFCA and the CPA by "making unreasonable, arbitrary, and unjustifiable deductions to
 9 the invoices of defense counsel." Counterclaims, Docket No. 52 at ¶ 6.4.

10 II. STANDARD

11 Washington law regulates an insurer's duty to defend in the context of a reservation of
 12 rights; the duty to defend is controlled by the so-called *Tank* doctrine: "An insurer defending its
 13 insured under a reservation of rights has 'an enhanced obligation of fairness toward its insured'
 14 because of the '[p]otential conflicts between the interests of insurer and insured, inherent in a
 15 reservation of rights defense.' Fulfilling this enhanced obligation requires the insurer to . . . 'refrain
 16 from engaging in any action which would demonstrate a greater concern for the insurer's monetary
 17 interest than for the insured's financial risk.'" *Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 169 P.3d 1, 7-8 (Wash. 2007) (quoting *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133 (Wash. 1986)) (internal citations omitted).

20 III. ANALYSIS

21 A. Bad Faith and Negligence

22 "An action for bad faith handling of an insurance claim sounds in tort." *Mutual of*
 23 *Enumclaw Ins. Co.*, 169 P.3d at 8 (quoting *Safeco Ins. Co. of Am. v. Butler*, 823 P.2d 499, 503
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1 (Wash. 1992). As such, to demonstrate bad faith, the insured must demonstrate a duty on the part
 2 of the insurer, breach of that duty, and damages proximately caused by the breach. *Mutual of*
 3 *Enumclaw Ins. Co.*, 169 P.3d at 8. In addition, “[i]n order to establish bad faith, an insured is
 4 required to show the breach was unreasonable, frivolous, or unfounded.” *Id.* (quoting *Kirk v.*
 5 *Mount Airy Ins. Co.*, 951 P.2d 1124, 1126 (Wash. 1998). “Bad faith will not be found where a
 6 denial of coverage or a failure to provide a defense is based upon a reasonable interpretation of the
 7 insurance policy” (in this case, Evanston’s Litigation Guidelines). *Kirk*, 951 P.2d at 1126.

8 Here, Defendants’ counterclaims are premised on a dispute concerning billing for
 9 attorney’s fees. There is no question that Evanston has reimbursed Defendants for approximately
 10 \$1,422,000 in attorney’s fees. Evanston’s stated reason for declining to reimburse Defendants for
 11 the remaining disputed amount, which amounts to less than \$50,000, is that Defendants did not
 12 comply with Evanston’s Litigation Management Guidelines. Decl. of Justin S. Landreth, Docket
 13 No. 38 at p. 9 of 37. Defendants have raised no question as to whether the Management Guidelines
 14 are reasonable. Indeed, Defendants appear to acknowledge this point in a letter sent to Evanston,
 15 stating that “[t]he defense team recognizes the need to adhere to any certain litigation guidelines .
 16 . . .” Decl. of Justin S. Landreth, Docket No. 38 at p. 26 of 37. Defendants’ opposition to the
 17 instant motion is devoid of any discussion of the Guidelines, and Defendants cannot (and do not)
 18 now contend that the Guidelines were unreasonable. Accordingly, the Court finds that Evanston’s
 19 Litigation Management Guidelines are reasonable.

20 **B. Reasonableness of Paid and Withheld Attorney’s Fees**

21 Given the reasonableness of Evanston’s Litigation Management Guidelines, the question
 22 becomes whether Evanston’s failure to reimburse specific costs was reasonable. The question of
 23 award of attorney’s fees, as well as what amount of attorney’s fees qualify as “reasonable,” is a
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1 question for the court. *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); *see also Chalmers v. City*
 2 *of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986) (holding that the district court determines a
 3 reasonable rate of attorney compensation).

4 Evanston, in several letters attached to the Declaration of Justin S. Landreth, Docket No.
 5 38, provides a detailed breakdown of the various deductions made by Evanston with respect to
 6 Defendants' requests for reimbursement of attorney's fees. Evanston also includes Defendants'
 7 responses to said deductions. *Id.* In many cases Evanston provided additional payment on appeal
 8 when Defendants provided more information regarding a disputed reimbursement. *Id.* The Court
 9 has reviewed Evanston's explanations concerning deductions and denials of payment. These
 10 deductions and denials appear to be based upon reasonable application of Evanston's Litigation
 11 Management Guidelines. The following examples are illustrative:

12 Evanston declined to pay the full reimbursement requested by Defendants where a single
 13 attorney was billing in excess of ten hours a day, a practice prohibited by Evanston's Litigation
 14 Management Guidelines. Decl. of Justin S. Landreth, Docket No. 38 at p. 13 of 37. As noted by
 15 Evanston, Defendants did not indicate that this pace of work was necessary because of an
 16 emergency, and the work was not taking place during trial, in which case it would have been
 17 permitted. Rather, it involved simple document review. *Id.* Evanston's refusal to pay attorney's
 18 fees in excess of ten hours a day from a single attorney was a reasonable application of Evanston's
 19 Guidelines.

20 Similarly, Evanston declined to reimburse Defendants for approximately \$400 for
 21 "strategy discussion," noting that its Litigation Management Guidelines specifically prohibited
 22 reimbursement for "intra-office conferences." Based on the description of the charge submitted
 23 by Defendants for reimbursement, Evanston's refusal to pay attorney's fees for a "strategy
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1 "discussion" was a reasonable application of its Guidelines. Decl. of Justin S. Landreth, Docket
2 No. 38 at pp. 16-17 of 37.

3 Evanston further declined to pay approximately \$16,000 in attorney's fees due to
4 excessive time spent on various tasks. One such task involved Defendants' having an associate
5 review documents to determine whether a chemical formula was identified in the documents; this
6 document review was only the first step in the review process, as a partner or patent attorney would
7 then further review the identified documents. Decl. of Justin S. Landreth, Docket No. 38 at pp.
8 11-12. Evanston determined that excessive time was spent on the task when the associate's pace
9 was only 35 pages an hour. *Id.* Based on the limited nature of the task, the Court finds that
10 Evanston's deduction for excessive time was reasonable.

11 Finally, Evanston also declined to pay for training for Defendants' staff and for database
12 management, finding that these costs were "administrative and overhead cost of doing business,"
13 and thus were not part of the cost of a "reasonable defense." Evanston's refusal to pay costs not
14 directly related to the provision of defense to Defendants was also a reasonable application of
15 Evanston's Litigation Management Guidelines. Decl. of Justin S. Landreth, Docket No. 38 at pp.
16 14-15 of 37.

17 The Court notes that in many cases, including its evaluation of excessive time spent on
18 tasks, duplication of efforts by partners and associates, and determining whether research on a
19 specific topic in excess of five hour was reasonable, Evanston authorized full reimbursement when
20 presented with additional information by Defendants. Decl. of Justin S. Landreth, Docket No. 38.
21 Evanston's willingness to provide additional reimbursement is further evidence of its reasonable
22 application of the Guidelines, and demonstrates that Evanston was not "engaging in any action

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1 which would demonstrate a greater concern for the insurer's monetary interest than for the insured's
 2 financial risk." *Mutual of Enumclaw Ins. Co.* 169 P.3d at 8.

3 As noted above, a court will not find bad faith where the insurer acts "based upon a
 4 reasonable interpretation of the insurance policy." *Kirk*, 951 P.2d at 1126. Here, Evanston acted
 5 reasonably in refusing to reimburse a small portion of Defendants' attorney's fees (some amount
 6 less than \$50,000 out of \$1,472,487.13) based upon Defendants' failure to comply with Evanston's
 7 Litigation Management Guidelines. Defendants may now disagree with those Guidelines, but they
 8 agreed to abide by them when choosing to be defended by attorneys of their own choice.
 9 Defendants have failed to demonstrate that Evanston's denial of the contested fees was
 10 "unreasonable, frivolous, or unfounded," or involved an unreasonable application of Evanston's
 11 guidelines. *Mutual of Enumclaw Ins. Co.*, 169 P.3d at 8. Accordingly, the Court will grant
 12 summary judgment to Evanston as to Defendants' counterclaims of bad faith and negligence.

13 **C. IFCA & Consumer Protection Act**

14 Defendants' IFCA and CPA counterclaims against Evanston are premised upon the same
 15 nonpayment of attorney's fees discussed above. Because the Court finds that Defendants have
 16 failed to establish that Evanston's denial of payment of attorneys' fees was unreasonable,
 17 Defendants' IFCA and CPA claims also fail. Accordingly, the Court will grant summary judgment
 18 to Evanston as to Defendants' IFCA and CPA counterclaims.

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1 **IV. CONCLUSION**

2 For the reasons stated above, the Court finds that Defendants have failed to establish that
3 Evanston acted unreasonably in denying payment of a portion of Defendants' attorney's fees.
4 Accordingly, **IT IS HEREBY ORDERED** that Plaintiff's Motion for Summary Judgment is
5 **GRANTED.**

6 Dated: March 22, 2016

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11 BARBARA J. ROTHSTEIN
12 UNITED STATES DISTRICT JUDGE
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